CA No. 11-10182

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCEL DARON KING, Defendant-Appellant.	CA No. 11-10182 D.C. No. 3:10-cr-00455-WHA-1

APPELLANT'S PETITION FOR REHEARING EN BANC

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UNITED STATES OF AMERICA,	)	
	)	CA. No. 11-10182
Plaintiff-Appellee,	)	
	)	D.C. No. 3:10-cr-00455-WHA-1
v.	)	
	)	
MARCEL DARON KING,	)	
	)	
Defendant-Appellant.	)	
	)	

A panel of this Court correctly held, in a published per curiam opinion, that the district court erred in determining that the probation search of Appellant Marcel Daron King's room was supported by reasonable suspicion. *See United States v. King*, __ F.3d __, 2012 WL 807016 (9th Cir. Mar. 13, 2012) at *5. Nevertheless, the panel affirmed the denial of King's motion to suppress on the grounds that a binding precedent, *United States v. Baker*, 658 F.3d 1050 (9th Cir. 2011), compels such a result. However, the holding in *Baker* – that the Fourth Amendment permits the suspicionless search of a probationer, the same as a parolee – is premised on an outdated rule equating probationers and parolees, and plainly conflicts with the

reasoning of a recent decision of the U.S. Supreme Court, *Samson v. California*, 547 U.S. 843 (2006). *Samson* upheld the suspicionless search of a parolee, but in doing so expressly distinguished between probationers and parolees for Fourth Amendment purposes. *See id.* at 850 ("[P]arolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.").

In recognition of this conflict, two judges on the panel here "urge the court to reconsider en banc" the issue presented in this case: whether the suspicionless search of a probationer's residence violates the Fourth Amendment. *See King*, 2012 WL 80706 at *5 (Graber and Berzon, J.J., concurring). In order to address this question of exceptional importance, and to secure and maintain uniformity of this Court's decisions, rehearing en banc should be granted.

BACKGROUND

During the early morning hours of May 10, 2010, San Francisco Police Inspector Joseph Engler received an uncorroborated, hearsay-within-hearsay tip that Marcel King had been involved in a handgun homicide occurring the night before. King was on probation for a prior felony conviction, but had never previously been arrested for any firearm offense, let alone a homicide. Engler went to the residence of King's mother, where he found an unloaded shotgun under the bed in King's room during a warrantless search. King was never charged in the

handgun homicide case. Instead, King was charged with being a felon in possession of the unloaded shotgun, in violation of 18 U.S.C. § 922(g). In response, King moved *inter alia* to suppress the fruits of the warrantless search of his room on the grounds that it was not supported by reasonable suspicion.

I. Factual Background

While investigating at the scene of the handgun homicide, Engler received information regarding the supposed shooter from a person identified as "CW1." *King*, 2012 WL 807016 at *1. CW1 did not claim to be an eyewitness to the shooting. *Id.* CW1 told Engler about receiving some information from a third person identified as "Moniker." *Id.* Moniker likewise did not claim to have been an eyewitness. *Id.* Instead, CW1 told Engler that Moniker described having been provided the information by a fourth person identified as "CW2." *Id.* Thus, the information went from CW2 to Moniker to CW1 to Engler.

CW1 told Engler some of what Moniker had relayed about what CW2 had said to Moniker about the shooter. *Id.* More details emerged when Engler listened (unbeknownst to Moniker) to a phone call between Moniker and CW1. *Id.* While still standing near the scene of the crime with Engler, CW1 used a cell phone to call Moniker. *Id.* CW1 put the phone in "speaker" mode so that Engler could hear the conversation, but did not tell Moniker that a police officer was listening. *Id.* During that conversation, Moniker said that CW2 had described the shooter as a

heavyset African-American man with dreadlocks and referred to him as "Marcel" from the cover of the "Bread Me Out Family" rap album. *Id.*

After the phone call ended, CW1 explained that he/she was familiar with Marcel from the neighborhood. *Id.* CW1 also said that Marcel had been involved in an altercation with the victim some weeks earlier at Marcel's son's school. *Id.* The dispute was over whether the victim's child had accidentally taken Marcel's son's coat. *Id.* With regard to potential for bias, there was an acknowledged "history of family feuds" between CW1 and King, which the district court found "weighs toward wanting to implicate" King as "a Hatfield, if CW1 was a McCoy." Excerpts of Record ("ER") 62; *see also* ER 155-56.

After receiving the tip, Engler led a group of police officers in conducting a warrantless probation search of the residence of King's mother. *See King*, 2012 WL 807016 at *2. King's conditions of probation included the following: "Defendant is subject to a warrantless search condition, as to defendant's person, property, premises and vehicle, any time of day or night, *with or without probable cause*, by any peace, parole or probation officer." *King*, 2012 WL 807016 at *2 (emphasis added). This condition did not expressly provide for a search without *reasonable suspicion. See id.* During the search, the officers located an unloaded shotgun under the bed in King's room. *Id.* They found no ammunition in the residence. *See* ER 266-67. In fact, there was no evidence that the shotgun had

ever been loaded, or had ever been removed from that bedroom after it was given to King by a childhood friend. ER 35-36, 89-90.

II. Procedural History

King was charged with felon firearm possession in violation of 18 U.S.C. § 922(g). King moved under the Fourth Amendment to suppress the fruits of the warrantless search of his room in his mother's residence, arguing *inter alia* that the officers lacked reasonable suspicion for a probation search. The district court denied the motion on the ground that the hearsay-within-hearsay tip constituted reasonable suspicion for a probation search of King's room. ER 56.[1]

On King's appeal of the denial of this motion to suppress, this Court held that the district court had erred in determining that the facts and circumstances of this case amounted to reasonable suspicion. *See King*, 2012 WL 807016 at *5. The analysis in the majority opinion begins with the recognition that "[r]easonable suspicion 'exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for

[1] King was thereafter convicted at a bench trial. The government withheld consent for a conditional plea under Federal Rule of Criminal Procedure 11(a)(2) that would have preserved King's right to appeal the denial of his motion to suppress. ER 140, 348, 379-80. As a result, King requested that trial be set to prevent the forfeiture of his appellate rights. ER 380. King repeatedly proposed that the parties waive the right to a jury, and the government eventually agreed. ER 126, 140. King also voluntarily stipulated to all testimony the government's witnesses would have presented at trial. ER 105-11. After finding King guilty, the court sentenced him on April 8, 2011, to 39 months imprisonment. ER 50.

particularized suspicion.'" *Id.* at *2 (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (italics in original)). That opinion goes on to recognize that "[i]nformation obtained from an informant can provide reasonable suspicion for a search." *Id.* at *3 (citation omitted). Nevertheless, this Court held that there was no such reasonable suspicion here.

Specifically, "CW1 lacked most of the indicia of a reliable informant":

> CW1 and Officer Engler did meet face-to-face. But CW1 had no track record of reliability, having never before served as an informant for the SFPD. Furthermore, although CW1 did reveal his/her basis of knowledge, that basis of knowledge was double hearsay. Police may rely on hearsay reported by informants, but such information is reliable only if there is a reason to believe that the hearsay is truthful. Here, no such circumstances exist.

Id. at *3 (citations omitted). The majority opinion also notes that CW1's credibility was further undermined because the "police were aware that CW1 had a motive to implicate Defendant falsely because of friction between their families." *Id.* at *4 (citation omitted). As a result, "CW1 was an unreliable informant." *Id.*

Engler also heard directly from Moniker by listening, unbeknownst to Moniker, to a telephone conversation between Moniker and CW1. *Id.* But, like CW1, "Moniker had no track record of reliability, lacked firsthand information, and provided no predictive information about Defendant's future activities." *Id.* Furthermore, Moniker and Engler did not meet face-to-face. *Id*. (citation omitted).

> Engler had no opportunity to observe Moniker's demeanor. Furthermore, Moniker did not know that he/she was speaking to a police officer at the same time as he/she was chatting with CW1. For that reason, Moniker could not

> have felt pressure to tell the truth in order to avoid being held criminally accountable for providing a false tip, because Moniker never knew that he/she was providing a tip in the first place.

Id. As such, this Court explained that "the information provided by Moniker possessed no greater indicia of reliability than that provided by CW1." *Id.* Taken together, this Court held that the "information provided by CW1 and Moniker linking Defendant to the homicide was therefore highly unreliable." *Id.*

However, the majority further opined that the "conclusion that police lacked reasonable suspicion to search" King's room "does not end the inquiry as to whether the district court properly denied Defendant's motion to suppress." *Id.* at *5. Instead, the majority cited *United States v. Baker*, 658 F.3d 1050, 1055-56 (9th Cir. 2011), for the proposition that "a suspicionless search of a probationer does not violate the Fourth Amendment." *King*, 2012 WL 807016 at *5. On this basis, the panel affirmed the denial of King's motion to suppress. *See id.*

Nevertheless, in a separate opinion, two members of the panel – Judge Graber, joined by Judge Berzon – urged that King's case be reheard en banc:

> I concur fully in the per curiam opinion. But, for the reasons expressed in the concurrence in *United States v. Baker*, 658 F.3d 1050, 1058-60 (9th Cir. 2011) (Graber, J., concurring), I again urge the court to reconsider this issue en banc so as to take account of developments in Supreme Court law.

King, 2012 WL 807016 at *5 (Graber and Berzon, J.J., concurring).[2]

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[2] Judge Tallman also wrote separately, concurring in the judgment on the (continued...)

ARGUMENT

This Court has repeatedly held that probationers "do not waive their Fourth Amendment rights by agreeing, as a condition of probation, to 'submit [their] person and property to search at any time upon request by a law enforcement officer.'" *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) (quoting *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 261 (9th Cir. 1975) (en banc)); *see also Consuelo-Gonzalez*, 521 F.2d at 262 ("[A]ny search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness."). However, this Court's more recent decisions holding, as here, that reasonable suspicion is not necessary for a warrantless search of a probationer's residence, have diverged from critical developments in Supreme Court law, necessitating en banc review of this case.

In *Griffin v. Wisconsin*, 483 U.S. 868, 870-71 (1987), the Supreme Court held that a search of a probationer's home without a warrant, but with "reasonable grounds" to suspect the presence of contraband, did not violate the Fourth Amendment. Likewise, in *United States v. Knights*, 534 U.S. 112, 119-22 (2001), the Court held that a search of a probationer's home with reasonable suspicion only

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[2] (...continued)
grounds that he would have affirmed the district court's determination that the search was supported by reasonable suspicion. *See id.* at *5-*9 (Tallman, J., concurring in the judgment).

(and not probable cause) did not violate the Fourth Amendment. *Knights* specifically noted that "[w]e do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* at 120 n.6. *Knights* thus left open the question raised here: whether the suspicionless search of a probationer's residence violates the Fourth Amendment.

The next Supreme Court case in this line involved a parolee, rather than a probationer. In *Samson v. California*, 547 U.S. 843, 846 (2006), the Court addressed whether a search conducted under a California statute authorizing suspicionless searches of all parolees violated the Fourth Amendment. Drawing on *Knights* in particular, *Samson* held that the suspicionless search of the parolee's home did not violate the Fourth Amendment. *Id.* at 850-56. In discussing the privacy interest of the parolee, *Samson* explained:

> As we noted in *Knights*, parolees are on the "continuum" of state-imposed punishments. On this continuum, *parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.* As this Court has pointed out, "parole is an established variation on imprisonment of convicted criminals . . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."

Id. at 850 (emphasis added) (citation omitted) (ellipsis in original). After an extended discussion, *Samson* concluded that "*parolees* like petitioner have

severely diminished expectations of privacy by virtue of their status alone . . . [such that] petitioner did not have an expectation of privacy that society would recognize as legitimate." *Id.* at 852 (emphasis added). Ultimately, balancing the parolee's diminished interests against the State's interest, *Samson* held that the suspicionless search of the parolee in *Samson* was reasonable. *See id.* at 852-855 & n.4.

Samson did not address the question left open in *Knights* and raised here: whether the suspicionless search of a *probationer's* residence violates the Fourth Amendment. But, the statement in *Samson* – that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment" – indicates that, although a suspicionless search of a *parolee* will generally be constitutional, a suspicionless search of a *probationer* may not.

However, this Circuit's own recent jurisprudence has overlooked the important distinction drawn in *Samson* between parolees and probationers. Shortly before the Supreme Court decided *Samson*, this Court decided *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005) (en banc). *Motley* explained – correctly at that time – that "[w]e have consistently recognized that there is no constitutional difference between probation and parole for purposes of the fourth amendment." *Id.* at 1083 n.9 (internal quotation marks omitted). As *Samson* subsequently made clear,

though, there is indeed such a constitutional difference, notwithstanding this Court's prior statement in *Motley*.

Nevertheless, this Court has continued to apply the old rule from *Motley* in both parole and probation search cases decided after *Samson*. For instance, in *United States v. Lopez*, 474 F.3d 1208, 1213 n.5 (9th Cir. 2007), this Court addressed the validity of a parole search by quoting the statement from *Motley* equating parolees and probationers. *Lopez* also stated, incorrectly, that "*Knights* left open the issue decided in *Samson*: 'We do not decide whether the *probation* condition so diminished, or completely eliminated, Knights's reasonable expectation of privacy . . . .'" *Id.* at 1214 n.6 (emphasis added). In fact, *Samson* decided whether a suspicionless search of a *parolee* was permissible, but did not decide whether a suspicionless search of a *probationer* was permissible.[3]

[3] Since *Samson*, some other courts have at least suggested that reasonable suspicion is required for a probation search. *See United States v. LeBlanc*, 490 F.3d 361, 365 (5th Cir. 2007) ("[T]o conduct a nonconsensual search of a probationer's home for ordinary law enforcement purposes under these limited expectations of privacy, it is necessary to show reasonable suspicion that the probationer is engaged in criminal activity."); *Osborne v. Long*, 2012 WL 851106 (S.D.W.V. Mar. 13, 2012) at *8 ("Warrantless searches of a probationer's person, vehicle, and residence, require reasonable suspicion, not probable cause."); *see also United States v. Cofer*, 2009 WL 2824479 (S.D. Ohio Aug. 26, 2009) at *5 ("[B]ecause a home visit is far less intrusive than a probation search, probation officers conducting a home visit are not subject to the reasonable suspicion standard applicable to probation searches under *Knights*.").

More recently, in *Sanchez v. Canales*, this Court again purported to apply the outdated rule from *Motley*, notwithstanding the intervening Supreme Court authority in *Samson* distinguishing parolees from probationers:

> There is no question, however, that parole and probation conditions are also categorically sufficient to justify the invasion of privacy entailed by a home search. *See Samson*, 547 U.S. at 847 (where a parolee has agreed to submit to warrantless searches as "a condition of release," subsequent warrantless, "suspicionless search[es] by a law enforcement officer [do] not offend the Fourth Amendment"); *see also Motley*, 432 F.3d 1072 (same).

574 F.3d 1169, 1174 (9th Cir. 2009) (full internal citation and footnote omitted); *see also id.* at 1174 n.3 ("Although both *Samson* and *Motley* were parole rather than probation cases, we have consistently recognized that there is no constitutional difference between probation and parole for the purposes of the fourth amendment." (citations and internal quotation marks omitted)).

Finally, after the briefing of King's appeal was completed, this Court in *United States v. Baker*, 658 F.3d 1050, 1054 (9th Cir. 2011), held that the above-quoted statement in *Sanchez* is binding precedential authority in upholding a probation condition that expressly provided for a search "with or without reasonable suspicion." On appeal, the defendant in *Baker* had asked this Court to strike that condition on the grounds that the rule in *Motley* equating probation with parole was fundamentally inconsistent with the Supreme Court's intervening decision in *Samson*. *See id.* at 1056. However, this Court rejected that request on the grounds that, "[s]ince we decided *Sanchez* in 2009, there has been no such

intervening authority" and "we cannot ignore our own precedent." *Id.*

Nevertheless, Judge Graber, the author of the decision in *Baker,* also wrote separately in that case to urge the full Court to address this issue en banc. *See id.* at 1058 (Graber, J., concurring). Specifically, Judge Graber explained that the statements in *Sanchez* approving of probation searches in the absence of reasonable suspicion, while having binding precedential effect, nevertheless "are incorrect" in light of the Supreme Court's decision in *Samson. Id.* at 1060. Before *Sanchez,* neither the Supreme Court nor this Court had ever held that police officers may search the home of a probationer without reasonable suspicion. *See id.*[4] Judge Graber's concurring opinion in *Baker* "expressed no view on whether a suspicionless search of a probationer violates the Fourth Amendment," but noted that this Court's "continued reliance on the proposition that there is no difference between parolees and probationers in this context directly contravenes the Supreme Court's clear statements in *Samson* and, critically, forecloses our ability to resolve that significant question on its merits." *Id.* As a result, Judge Graber urged this Court in *Baker* to "convene en banc so that we can correct our mistaken continued application of the *Motley* rule." *Id.*

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[4] Between *Sanchez* and *Baker,* this Court did on the contrary suggest in *United States v. Franklin,* 603 F.3d 652, 654 n.1 (9th Cir. 2010), that under *Samson* the distinction between probation and parole "might make a difference – notably, for the purposes of reasonable expectation of privacy under the Fourth Amendment."

The defendant in *Baker* filed a petition for rehearing en banc, and this Court directed the government to respond. *See United States v. Baker,* No. 10-10223 (Docket ##42-44). However, the government's brief opposing en banc review persuasively contended that the issue of whether the probation search condition in question was violative of the Fourth Amendment had become moot since Baker was at that time no longer on probation. *See id.* (Docket #45) at 11-14. This Court agreed with the government, dismissing as moot the part of Baker's petition for rehearing relating to the Fourth Amendment challenge to his former probation condition. *See id.* (Docket #46).

Now, this same issue of whether a probationer is equivalent for Fourth Amendment purposes to a parolee – who may be subjected to suspicionless searches – is again squarely presented in King's case. The panel here correctly held that the district court erred in determining that the facts in this case amounted to reasonable suspicion to search King's room:

> [W]e face a situation in which the police conducted a search of Defendant's room solely because of a highly unreliable tip, without having investigated Defendant's alleged involvement in the homicide. The *only* information linking Defendant to the homicide was CW1 and Moniker's unsubstantiated double and triple hearsay. In these circumstances, police lacked a reasonable suspicion that Defendant was engaged in criminal activity.

King, 2012 WL 807016 at *5 (emphasis in original). However, citing *Baker,* this Court again held that "a suspicionless search of a probationer does not violate the Fourth Amendment." *Id.* As a result, the denial of King's motion to suppress was

affirmed. *See id.* Nevertheless, in a separate opinion, two judges on the panel here urge that King's case be reheard en banc for the same reasons as set forth in Judge Graber's concurrence in *Baker*. *See id.* (Graber and Berzon, J.J., concurring). Appellant agrees that en banc review is warranted in this case, and respectfully requests that this Court grant such review.[5]

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[5] It bears noting that the majority opinion, *King*, 2012 WL 807016 at *5, states that King's claim "falls squarely within the purview of *Baker*," even though King's condition of probation, unlike Baker's, did not expressly provide for a suspicionless search. *Compare id.* at *2 ("Defendant is subject to a warrantless search condition, as to defendant's person, property, premises and vehicle, any time of day or night, with or without probable cause, by any peace, parole or probation officer."), *with Baker*, 658 F.3d at 1054 ("The defendant shall submit his person, property, place of residence, vehicle and personal effects to search at any time of the day or night, with or without a warrant, with or without probable cause, and with or without reasonable suspicion, by a probation officer or any federal, state or local law enforcement officer."). The majority here, without citation to authority, rejected King's argument that this distinction was salient:

> Simply because a search *may* be conducted *without* probable cause does not mean that it *must* be conducted *with* reasonable suspicion. It would be unreasonable to read Defendant's probation condition as implicitly imposing a reasonable suspicion requirement. To the contrary, the plain import of Defendant's probation condition, allowing warrantless searches at any time, is that Defendant may be searched whether or not police suspect him of wrongdoing.

King, 2012 WL 80706 at *5 (emphasis in original). However, neither this Court nor the Supreme Court has ever before construed a probation condition expressly providing for a search without or without "probable cause" as also implicitly providing for a entirely suspicionless search.

Morever, the Supreme Court in both *Knights* and *Samson* held that the express language of such a search condition does make a salient constitutional difference. *See Knights*, 534 U.S. at 119-20 ("The probation order clearly

(continued...)

As Judge Graber's concurrence in *Baker* explained, it has been "by oversight," that this Court's "recent opinions erroneously have foreclosed Defendant's potentially viable Fourth Amendment arguments." *Baker*, 658 F.3d at 1058 (Graber, J. concurring). Although the panel in King's case could not "correct that mistake, the en banc court can." *Id.* (citation omitted). The dissonant state of the law on this exceptionally important issue is creating conflict and confusion that can only be quelled by en banc review. Accordingly, it is respectfully submitted that this Court should rehear this case en banc.

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[5] (...continued)
expressed the search condition [providing for a search without or without 'reasonable cause'] and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights' reasonable expectation of privacy."); *see also Samson*, 547 U.S. at 852 ("Additionally, as we found 'salient' in *Knights* with respect to the probation search condition, the parole search condition under California law–requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer 'at any time'–was 'clearly expressed' to petitioner." (citations omitted)). Thus, it is respectfully submitted that en banc review is also warranted in this case to harmonize the majority's construction of King's probation condition with the Supreme Court's analysis in *Knights* and *Samson.*

CONCLUSION

For the aforementioned reasons, rehearing en banc should be granted in this case to maintain uniformity of this Court's decisions and to address a question of exceptional importance regarding whether the Fourth Amendment permits a suspicionless probation search.

Dated: March 27, 2012

Respectfully submitted,

GEOFFREY A. HANSEN
Acting Federal Public Defender

s/ Daniel P. Blank

DANIEL P. BLANK
Assistant Federal Public Defender

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Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer

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No. 11-10182

IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCEL DARON KING,

Defendant-Appellant.

OPPOSITION TO PETITION FOR REHEARING EN BANC

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
District Court No. 10-CR-00455 WHA

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OPPOSITION TO PETITION FOR REHEARING EN BANC

Marcel Daron King seeks rehearing en banc of the panel's decision affirming his felony conviction under 18 U.S.C. § 922(g)(1). King asks this Court to reconsider its decision in *United States v. Baker*, 658 F.3d 1050, 1056 (9th Cir. 2011), holding that a suspicionless search of a probationer's residence does not *per se* violate the Fourth Amendment. En banc review is not appropriate here.

First, *Baker* is not dispositive. By accepting a warrantless search provision as a condition of his state probation, King consented to the search of his residence under prevailing California state precedent. Moreover, the government presented clear evidence that King's mother independently consented to the search of King's room within her home. Even if the search is not affirmed based on *Baker*, this Court must either affirm based on King's consent or remand to the district court to resolve the outstanding factual disputes regarding King's mother's consent.

Second, as the dissent correctly stated, the search of King's bedroom was supported by reasonable suspicion. The district court's decision should be affirmed on that basis. Thus, an en banc panel need not reach the *Baker* issue.

Third, the search condition comports with the Fourth Amendment and with *Samson v. California*, 547 U.S. 843 (2006), and rehearing en banc is thus unwarranted.

FACTUAL STATEMENT

A. The District Court Proceedings

The district court denied King's motion to suppress the shotgun found in his room. The court held that the search of King's residence was supported by reasonable suspicion, and did not address whether the search was alternatively authorized by consent, or whether reasonable suspicion was necessary. ER 55-63.

B. The *Baker* Decision

In *Baker*, this Court determined that it was "bound by precedent" to hold that "a suspicionless search of a probationer does not violate the Fourth Amendment." *Id.* at 1055. In *Samson*, the Supreme Court held that "a suspicionless search of a parolee does not violate the Fourth Amendment." 547 U.S. at 846. Pre-*Samson*, this Court held that "there is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment." *Motley v. Parks*, 432 F.3d 1072, 1083 n.9 (9th Cir. 2005) (en banc)); *see also Sanchez v. Canales*, 574 F.3d 1169, 1174 & n.3 (9th Cir. 2009). *Baker* applied the *Motley* rule, holding that "[b]ecause a suspicionless search of a parolee does not violate the Fourth Amendment, . . . and because our precedent dictates that there is no constitutional difference between probation and parole for purposes of the [F]ourth [A]mendment, . . . we must conclude that a suspicionless search of a

probationer does not violate the Fourth Amendment." *Baker*, 658 F.3d at 1055-56 (internal citation and quotation marks omitted).

C. The Panel's Decision

On appeal, King challenged the district court's decisions to admit King's confession and the firearm found in King's residence. On March 13, 2012, a panel of this Court (Judges Graber, Berzon, and Tallman), issued an unpublished opinion affirming the district court's suppression of King's confession. *United States v. King*, 2012 WL 824054 (9th Cir. Mar. 13, 2012). The panel issued a published decision affirming the admission of the firearm. In a per curiam opinion, the panel stated that the search of King's residence was not supported by reasonable suspicion, but held that the search was nonetheless authorized under *Baker*. 2012 WL 807016, at *5 (9th Cir. Mar. 13, 2012). Judges Graber and Berzon concurred in the per curiam opinion, but urged this Court to hear the *Baker* issue en banc. *Id.* Judge Tallman concurred in the judgment, but stated that in his assessment of the record, there was sufficient evidence to support reasonable suspicion that King was engaged in illegal activity. *Id.* at *6-*9.

ARGUMENT

I. Standard for En Banc Review

Rehearing en banc is warranted only to maintain uniformity among Circuit

decisions, between Circuit decisions and Supreme Court precedent, or to address questions of exceptional importance. Fed. R. App. P. 35(a), (b); Ninth Cir. R. 35-1.

II. Rehearing en banc is inappropriate where the issue to be considered, even if resolved in King's favor, is not dispositive.

This case does not present an effective vehicle for en banc review even accepting the proposition that *Baker* warrants reconsideration. Although the per curiam opinion rested its decision on *Baker*, King's conviction may be affirmed on any of three alternative grounds. Because the *Baker* issue, even if resolved in King's favor, may not be dispositive, this case does not posit the issue squarely for en banc review. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *see also Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012) (noting that "courts generally decide constitutional questions on the narrowest ground available").

A. Under California law, King consented to the search of his residence when he accepted the terms of probation.

King accepted the conditions of probation imposed by the Superior Court of California, County of San Francisco on August 24, 2007. In doing so, he

consented to being subject to "a warrantless search condition, as to defendant's person, property, premises and vehicle, any time of the day or night, with or without probable cause, by any peace, parole or probation officer." ER 408-09. The California Supreme Court has held that a probationer's acceptance of such a search condition constitutes valid consent to a suspicionless search. *People v. Bravo*, 43 Cal. 3d 600, 608-10 (1987).

The nature and scope of a state court-imposed sentence is a question of state law, and this Court must accept the California Supreme Court's characterization of its probation conditions. *See United States v. Conway*, 122 F.3d 841, 843-44 (9th Cir. 1997); *Bravo*, 43 Cal. 3d at 609-10.

The question of whether a probationer's consent to a blanket search condition is valid under the Fourth Amendment is a question of federal law, and was a question left open by the Supreme Court in *United States v. Knights*, 534 U.S. 112, 118 (2001). But the constitutionality of such consent is clear from the Court's Fourth Amendment jurisprudence. The Supreme Court has held that one may waive the Fourth Amendment's protections and consent to a search, and that a valid waiver of such protections requires a lesser showing than a waiver of trial rights. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that the state must show that consent to search was voluntary, not "knowing and

intelligent"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver."); *see also United States v. Barnett*, 415 F.3d 690, 692-93 (6th Cir. 2005) (holding that a probationer validly consented to suspicionless search clause); *People v. Woods*, 981 P.2d 1019, 1021 (Cal. 1999) ("In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term.").

King cites *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006), and *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975), for the proposition that probationers may not waive their Fourth Amendment rights by consenting to a search condition. Petition at 8. Neither case sweeps as broadly as King implies. *Scott* addressed the Fourth Amendment rights of a pre-trial detainee. 450 F.3d at 864. The distinction between a pre-trial detainee and a probationer is critical, as this Court noted in determining that the Supreme Court's decision in *Griffin v. Wisconsin*, 483 U.S. 868 (1987) – which upheld the search of a probationer's home without probable cause – did not control the inquiry in *Scott*. *Id.* at 872. *Consuelo-Gonzalez*, involving a federal probationer, rested its holding, in part, on an interpretation of the Federal Probation Act. 521 F.2d at 263-64. This Court expressly prohibited application of its holding to cases

involving state probation terms: "we express no opinion here regarding the extent to which the states constitutionally may impose conditions more intrusive on the probationer's privacy than those we here have indicated are proper under the Federal Probation Act." *Id.* at 266.

King's consent to his probation condition provides an independent ground to affirm the district court's decision and obviates the need to address the *Baker* issue. *See, e.g.*, *Jones v. Bates*, 127 F.3d 839, 855 (9th Cir. 1997) (where Court is presented with two constitutional issues it is "prudent" to address the narrower one first).

B. King's mother consented to the search of her home.

King was convicted for possessing a shotgun found in his bedroom within his mother's house. When police arrived at the home, King's mother, Veronica Bradford, answered the door. ER 65. She told the officers that King was not home, but showed them to King's room. *Id.* She signed a consent form authorizing the search. ER 397. The government introduced into evidence the signed form and the testimony of Lieutenant Joseph Engler, who stated that Bradford consented to the search and signed the form. ER 179-80, 189-90.

Bradford filed a declaration in support of King's motion to suppress, claiming that she did not consent to the search. ER 391. The district court held an

evidentiary hearing and took testimony from Bradford and Lieutenant Engler. ER 141-351. Although the court noted that Bradford's "testimony was impeached pretty thoroughly by the Government," the court denied King's motion to suppress based on its finding that the police had reasonable suspicion to search the residence, and so did not reach the consent issue. ER 40, 63. The existence of consent is a question of fact that must be resolved by the district court in the first instance. *See United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979).

Consent – either King's or Bradford's – provides an independent ground for denying King's motion to suppress the firearm, and the opportunity to decide the case on a narrower ground. This case does not best posit the *Baker* issue for en banc review. *See Ashwander*, 297 U.S. at 347.

C. The search of King's residence was supported by reasonable suspicion.

As Judge Tallman's concurrence stated, the district court held correctly that officers had reasonable suspicion to connect King to the homicide then under investigation. 2012 WL 807016, at *6. Reasonable suspicion "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en

banc). "[R]easonable suspicion is less demanding and can arise from information that is less reliable than that required to show probable cause." *United States v. Rowland*, 464 F.3d 899, 907 (9th Cir. 2006). Courts must consider the totality of the circumstances in determining whether an officer had reasonable suspicion. *See United States v. Cortez*, 449 U.S. 411, 417 (1981).

Here, Lieutenant Engler, a 19-year veteran homicide detective, had information suggesting that King had both a motive and the opportunity to shoot the victim. A citizen informant and relative of the victim – "CW1" – approached Lieutenant Engler at the scene of the shooting in the early morning hours after the crime occurred. From CW1, Lieutenant Engler learned that King's family and the victim's family had a history of animosity, and that King and the victim fought a few weeks before the shooting. ER 60, 62. CW1 told Lieutenant Engler that King lived with his grandmother, just blocks from the crime scene. ER 165. Lieutenant Engler spoke with King's grandmother, who confirmed that King had been at the house the night of the shooting, but had not stayed. ER 174. Lieutenant Engler later learned that King had a recent felony conviction for a violent crime – felony assault on his domestic partner. *See United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995) (noting relevance of prior convictions to probable cause determination).

The district court found citizen informant CW1 to be sufficiently reliable. ER 62-63. *See United States v. Angulo-Lopez*, 791 F.2d 1394, 1397 (9th Cir. 1986) (holding that citizen informants require less evidence to prove their reliability than criminal informants). CW1 met Lieutenant Engler in person and explained the basis of his/her knowledge. *See Adams v. Williams*, 407 U.S. 143, 146-47 (1972) (suggesting in-person meeting enhances informant's reliability); *see also Rowland*, 464 F.3d at 907-08 (informant's disclosure of basis for knowledge enhances reliability). Lieutenant Engler approached CW1, not the other way around, and the two spoke while the crime scene investigation was ongoing. *See United States v. Palos-Marquez*, 591 F.3d 1272, 1277 (9th Cir. 2010) (noting increased reliability of contemporaneous tips).

In addition to CW1's direct knowledge of the animosity between King and the victim, CW1 also relayed information about the shooting told to him by an acquaintance – "Moniker." Moniker and another individual, "CW2", were at the scene when the shooting took place, and CW2 witnessed the crime. ER 60. According to Moniker, CW2 described the shooter's physical appearance, and identified him by the first name "Marcel." *Id.* CW1 confirmed that defendant Marcel King fit CW2's description of the shooter. *Id.*

An officer may rely on hearsay as a foundation for reasonable suspicion. *Angulo-Lopez*, 791 F.2d at 1397. There was sufficient indicia of reliability to permit Lieutenant Engler to do so here. Lieutenant Engler knew both Moniker and CW2 from prior contacts. ER 60. Moniker repeated his account of the night's events – including CW2's description of the shooter – to CW1 while Engler listened in on the phone call. *Id.* The fact that Moniker did not know that Engler was listening does not weaken the tip's reliability. Though face-to-face tips are deemed more reliable than anonymous ones, *Adams*, 407 U.S. at 146-47, that assessment says nothing about the reliability of communications between friends. Indeed, the reliability of such discussions is what makes confidential informants, undercover officers, and wiretaps effective investigative tools.

Because the officers had reasonable suspicion to support their search of King's residence, an en banc panel need not reach the *Baker* issue.

III. Rehearing En Banc Is Unwarranted To Address the Constitutionality of King's Probation Search.

Should the Court decide that the *Baker* issue is properly presented, rehearing en banc is still unwarranted because *Baker* and *Motley* fully comport with the Fourth Amendment. A suspicionless search condition is constitutional for both parolees and felony probationers.

In *Knights*, the defendant – a probationer – was subject to a suspicionless search condition as a term of his California state probation. 534 U.S. at 116. Knights sought to suppress evidence found during a probation search of his residence. *Id.* The Supreme Court held that the officers had reasonable suspicion to believe that Knights was involved in criminal conduct, and held that the Fourth Amendment "requires no more than reasonable suspicion to conduct a search" of a probationer's house. *Id.* at 120. The Court left open the question of whether reasonable suspicion was necessary, or if the Fourth Amendment permits suspicionless probation searches. *Id.* at 120 n.6.[1]

In *Samson*, the Supreme Court upheld a California parole condition that required all California parolees to submit to suspicionless searches. 547 U.S. at 847-57. Pre-*Samson*, this Court held that there is no constitutional difference between probation and parole for purposes of the Fourth Amendment. *Motley*, 432 F.3d at 1083 n.9. The question raised by the concurrence in *Baker* is whether the *Motley* rule survives *Samson*. 658 F.3d at 1058-59. It does.

In both *Samson* and *Knights*, the Court applied the basic Fourth Amendment "reasonableness" standard. "[T]he reasonableness of a search is determined 'by

[1] Notably, the Court did not adjudge the suspicionless search condition facially invalid. *Id.* at 114, 119-22.

assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" 534 U.S. at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Probationers and parolees share a diminished expectation of privacy. *See Knights*, 534 U.S. at 119 ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled."). In seeking en banc review, King makes much of the Supreme Court's comment in *Samson* that the forms of criminal punishment fall along a "continuum," and "[o]n this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." 547 U.S. at 850. Though *Samson* posits parole and probation as two points on the continuum, it does not plot the distance between them. Their shared characteristics – as highlighted by *Samson*'s analysis – make plain that the two sit close. In fact, their proximity is clear when one views the scope of the range, which spans from "solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Griffin*, 483 U.S. at 874. *Griffin* acknowledged that probation's position on the continuum may vary "depending on the number and severity of restrictions imposed." *Id.*

Samson explained a parolee's lowered expectation of privacy in terms that apply equally to probationers – their out-of-custody status depends on their compliance with various conditions that may include reporting requirements, drug testing and counseling, and restrictions on who they associate with, where they live, and whether, and where, they work. 547 U.S. 852; *compare with* Cal. Pen. Code § 1201 (authorizing court to impose "reasonable" probation conditions). *Samson* explained that the "extent and reach of these conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone," 547 U.S. 852, a statement that should apply equally to probationers subject to commensurate conditions. Like a parolee, a probationer who fails to comply with his imposed conditions may be remanded to physical custody. *See* Cal. Pen. Code § 1203.2(a), (c). Also like a parolee, a probationer is well warned of the conditions of his release. *See Knights*, 534 U.S. at 119-20 (noting that the defendant-probationer's knowledge of his search condition further diminished his reasonable expectation of privacy); *see also Samson*, 547 U.S. at 851 (same); *cf. Schneckloth*, 412 U.S. at 248-49.

Samson's analysis of the government interest side of the equation offers equally scant fodder for differentiation. *Samson* cites to *Griffin* and *Knights* – both probation cases – to pronounce the government's substantial interest in

controlling recidivism. 547 U.S. at 853. The Court recognized that probationers and parolees are more likely than the ordinary citizen to break the law, and both share an incentive "to conceal their criminal activities and quickly dispose of incriminating evidence . . . because [they] are aware that they may be subject to supervision and face revocation . . ., and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do no apply." *Knights*, 534 U.S. at 120; *Samson*, 547 U.S. at 854 (citing *Knights*). The Court recognized that unexpected searches are an effective tool that serves the public interest. *Knights*, 534 U.S. at 121; *Samson*, 547 U.S. at 854.

Although the distinction between parolees and probationers may make a difference in some Fourth Amendment contexts, in the context presented here and in *Baker* – where a suspicionless search condition is an explicit term of probation – the holding of *Samson* applies equally to probationers. *Cf. United States v. Betts*, 511 F.3d 872,876 (9th Cir. 2007) (approving an individualized suspicionless search condition for a federal supervised releasee). This Court's decision in *Motley* is still good law after *Samson* and does not need en banc reconsideration.

For the foregoing reasons, the rehearing petition should be denied.

Dated: April 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 40 and Circuit Rule 40-1, I certify that, the attached **OPPOSITION TO PETITION FOR REHEARING EN BANC** is proportionately spaced, has a typeface of 14 points or more and contains **3,284** words or fewer.

Dated: April 13, 2012

s/ SUZANNE B. MILES
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ TYLE L. DOERR
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